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FILED
07/10/2023
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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
43B-0697-R-2022
Lambert, Kathryn
12.00

MONTANA WATER COURT, YELLOWSTONE DIVISION
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN
BASIN 43B
PRELIMINARY DECREE

CLAIMANT: United States of America (National Park Service)

OBJECTOR: Church Universal & Triumphant Inc.

NOTICE OF INTENT TO APPEAR: Trout Unlimited

CASE 43B-0697-R-2022

43B 162377-00

43B 216281-00

43B 216282-00

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusion of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

These USA (Dept of Interior National Park Service) fish and wildlife claims appeared in

the Preliminary Decree with various issue remarks. The Church Universal & Triumphant Inc. objected to each claim. Trout Unlimited filed a notice of intent to appear for each claim. On April 14, 2023 the United States' Proposed Resolution Of Issue Remarks And Objections ["Proposed Resolution"] was filed. On April 27, 2023 Trout Unlimited filed its Notice Of Withdrawal Of Notice Of Intent To Appear stating the Proposed Resolution resolves its concerns. On April 28, 2023 the Church Universal & Triumphant Inc. filed its Notice Of Withdrawal Of Objections stating the Proposed Resolution resolves its objections. These settlement documents are viewable in the Court's FullCourt Enterprise case management system.

APPLICABLE LAW

The Water Court may include a flow rate or a volume, or both, as it determines is appropriate for a claim. Section 85-2-234(6)(b), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. Claim 43B 162377-00 had two implied claims generated from it: 43B 216281-00 and 43B 216282-00. The October 21, 1997 Order Granting Motion For Leave To Amend Claim ["1997 Order"] changed the basis of claim 43B 162377-00 from a RESERVED right to a DECREED right, authorized the generation of the implied claims, specified the elements and remarks for all three claims, and included an abstract for each of these claims reflecting the elements specified in the Order.

2. Each of these claims appeared in the Preliminary Decree with the following issue remark:

THE PRIORITY DATE MAY BE QUESTIONABLE. ACCORDING TO INFORMATION IN THE CLAIM FILE, THIS RIGHT IS THE RESULT OF A SETTLEMENT AGREEMENT WITH OTHER REESE CREEK WATER RIGHT CLAIMANTS AND REPRESENTS COMBINED HISTORIC WATER RIGHTS.

As stated in the remark text itself, the priority dates are the result of negotiated litigation settlement which ultimately resulted in the 1997 Order. The Proposed Resolution relates this same history concerning the priority dates in detail and states: “These changes were appropriate and preserve the relative priority of all the water rights for Reese Creek and its tributaries – thereby accomplishing their only material purpose – regardless of whether they can be tied to a specific, exact historical date of appropriation.” There is no factual or legal issue to address. The remark should be removed from each claim abstract.

3. Each of these claims appeared in the Preliminary Decree with the following issue remark:

THIS CLAIMED PURPOSE (USE) CANNOT BE CONFIRMED. THERE APPEARS TO BE NO APPROPRIATION OF WATER AS THE METHOD OF DIVERSION IS INSTREAM USE.

The claimed purpose for each claim is FISH AND WILDLIFE. As stated in the Proposed Resolution, this remark was added in 1997, before the 2002 Montana Supreme Court decision recognizing valid instream appropriations for fish and wildlife purpose in *In re Adjudication of Existing Rights to the Use of all Water*, 311 Mont. 327 (2002). Today there is no legal issue about whether a valid appropriation could be made by instream fish and wildlife use. The remark should be removed from each abstract.

4. Each of these claims appeared in the Preliminary Decree with a volume issue remark as follows:

43B 162377-00

NO VOLUME HAS BEEN CLAIMED.

43B 216281-00

NO VOLUME HAS BEEN CLAIMED. THE VOLUME GUIDELINE FOR THIS PURPOSE IS 186 ACRE-FEET PER YEAR.

43B 216282-00

NO VOLUME HAS BEEN CLAIMED. THE VOLUME GUIDELINE FOR THIS PURPOSE IS 1814.88 ACRE-FEET PER YEAR.

The 1997 Order states that the volume for each of these claims is not quantified, instead the following then-standard remark was inserted for the volume: “THE VOLUME IS LIMITED TO THE MINIMUM AMOUNT NECESSARY TO SUSTAIN THIS PURPOSE. THIS RIGHT SHALL CONTINUE TO BE UTILIZED IN ACCORDANCE WITH HISTORICAL PRACTICES.” The remark appears on the abstract for each of these claims attached to the 1997 Order. It is unclear why

it does not appear on the Preliminary Decree abstract for claim 43B 162377-00 but does appear on the abstracts for claims 43B 216281-00 and 43B 216282-00.

The volume remark should be restored to the abstract of claim 43B 162377-00. The volume issue remark should be removed from the abstract of each claim as a quantified volume is not necessary for these claims.

5. For claim 43B 162377-00, the Preliminary Decree also includes the following remark:

A GUIDELINE FOR THE FLOW RATE AND VOLUME OF THIS CLAIM CANNOT BE DETERMINED FROM AVAILABLE INFORMATION, AND FLOW RATE AND VOLUME REMAIN AS ORIGINALLY CLAIMED. THE CLAIMED FLOW RATE AND VOLUME CAN BE CONTESTED BY PROPER OBJECTION. IF NO OBJECTIONS ARE FILED TO THIS CLAIM THE FLOW RATE AND VOLUME WILL BE DECREED AS CLAIMED, AND THIS REMARK WILL BE REMOVED FROM THE CLAIM.

In addition to the volume determinations, the 1997 Order also determined the flow rate for each claim. Restoring claimed values to a claim from which two implied claims have been generated makes no sense. The flow rates and volumes should remain as determined in the 1997 Order. This remark should be removed as addressed and resolved.

6. The Preliminary Decree does not include the place of use on the abstracts for claims 43B 216281-00 and 43B 216282-00. The 1997 Order states that the place of use for each of the three claims is:

<u>QTRSEC</u>	<u>SEC</u>	<u>TWP</u>	<u>RGE</u>	<u>COUNTY</u>
E2SE	7	9S	8E	YELLOWSTONE PK
NWSW	8	9S	8E	YELLOWSTONE PK
SENE	8	9S	8E	YELLOWSTONE PK

This place of use appeared on each of the abstracts attached to the October 21, 1997 Order. It appears on the Preliminary Decree abstract for claim 43B 162377-00 but is missing on the Preliminary Decree abstracts for claims 43B 216281-00 and 43B 216282-00. The place of use should be restored to the abstracts of claims 43B 216281-00 and 43B 216282-00.

7. For claim 43B 162377-00, the Preliminary Decree also includes the following remark:

CLAIM WAS NOT INCLUDED IN THE BASIN 43B TEMPORARY PRELIMINARY DECREE ISSUED 01/16/1985.

This remark provides notice that the claim was not in the prior Decree. The remark should be removed as having served its notice purpose.

CONCLUSION OF LAW

The settlement filed by the parties is sufficient to restore the missing elements of these claims and to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusion of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 162377-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF INTERIOR NATIONAL PARK SERVICE)
1201 OAKRIDGE DRIVE, SUITE 250
FORT COLLINS, CO 80525

Priority Date: JUNE 1, 1883

Type of Historical Right: DECREED

Purpose (use): FISH AND WILDLIFE
INSTREAM FLOWS FOR THE MAINTENANCE OF ECOSYSTEMS AND ALL OTHER
USES CONSISTENT WITH PARK PURPOSES AS SET FORTH IN, 16 U.S.C. 1, THE ACT
OF MAY 26, 1926, AND THE PRESIDENTIAL PROCLAMATION OF OCTOBER 20, 1932.

Flow Rate: 1.37 CFS
THE ACTUAL FLOW RATE FOR THIS WATER RIGHT IS 1.375 CFS. COMPUTER
LIMITATIONS DO NOT ALLOW THE CORRECT FLOW RATE TO BE PRINTED ABOVE.
FLOW RATE LIMITED TO 1.25 CFS FROM APRIL 15 TO OCTOBER 15.

Volume: THE VOLUME IS LIMITED TO THE MINIMUM AMOUNTS NECESSARY TO SUSTAIN
THIS PURPOSE. THIS RIGHT SHALL CONTINUE TO BE UTILIZED IN ACCORDANCE
WITH HISTORICAL PRACTICES.
THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

Source Name: REESE CREEK
Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2SE	7	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	INSTREAM					
2		NWSW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	INSTREAM					
3		SENW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	INSTREAM					
Period of Use:	JANUARY 1 TO DECEMBER 31					

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
2			E2SE	7	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
3			SEnw	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)

Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

162377-00

216281-00

216282-00

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 216281-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF INTERIOR NATIONAL PARK SERVICE)
1201 OAKRIDGE DRIVE, SUITE 250
FORT COLLINS, CO 80525

***Priority Date:** JUNE 1, 1887

***Type of Historical Right:** DECREED

***Purpose (use):** FISH AND WILDLIFE
INSTREAM FLOWS FOR THE MAINTENANCE OF ECOSYSTEMS AND ALL OTHER
USES CONSISTENT WITH PARK PURPOSES AS SET FORTH IN, 16 U.S.C. 1, THE ACT
OF MAY 26, 1926, AND THE PRESIDENTIAL PROCLAMATION OF OCTOBER 20, 1932.

***Flow Rate:** 224.00 GPM

***Volume:** THE VOLUME IS LIMITED TO THE MINIMUM AMOUNTS NECESSARY TO SUSTAIN
THIS PURPOSE. THIS RIGHT SHALL CONTINUE TO BE UTILIZED IN ACCORDANCE
WITH HISTORICAL PRACTICES.
THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

***Source Name:** REESE CREEK
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2SE	7	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)

Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: INSTREAM

2		NWSW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
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Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: INSTREAM

3		SENE	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
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Period of Diversion: APRIL 15 TO OCTOBER 15

Diversion Means: INSTREAM

Period of Use: APRIL 15 TO OCTOBER 15

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
2			E2SE	7	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)

3	SENW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
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Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

162377-00	216281-00	216282-00
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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK
BASIN 43B

Water Right Number: 43B 216282-00 STATEMENT OF CLAIM
Version: 3 -- POST DECREE
Status: ACTIVE

Owners: USA (DEPT OF INTERIOR NATIONAL PARK SERVICE)
1201 OAKRIDGE DRIVE, SUITE 250
FORT COLLINS, CO 80525

***Priority Date:** JUNE 2, 1887

***Type of Historical Right:** DECREED

***Purpose (use):** FISH AND WILDLIFE
INSTREAM FLOWS FOR THE MAINTENANCE OF ECOSYSTEMS AND ALL OTHER
USES CONSISTENT WITH PARK PURPOSES AS SET FORTH IN, 16 U.S.C. 1, THE ACT
OF MAY 16, 1926, AND THE PRESIDENTIAL PROCLAMATION OF OCTOBER 20, 1932.

***Flow Rate:** 2.50 CFS

***Volume:** THE VOLUME IS LIMITED TO THE MINIMUM AMOUNTS NECESSARY TO SUSTAIN
THIS PURPOSE. THIS RIGHT SHALL CONTINUE TO BE UTILIZED IN ACCORDANCE
WITH HISTORICAL PRACTICES.
THE USE OF THIS WATER APPEARS TO BE LARGELY NONCONSUMPTIVE.

***Source Name:** REESE CREEK
Source Type: SURFACE WATER

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		E2SE	7	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: INSTREAM

2		NWSW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: INSTREAM

3		SENW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
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Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: INSTREAM

***Period of Use:** JANUARY 1 TO DECEMBER 31

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
2			E2SE	7	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)

3	SENW	8	9S	8E	PARK (YELLOWSTONE NATIONAL PARK)
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Remarks:

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

162377-00	216281-00	216282-00
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